A **CHOW CHIN THONG**

**v.**

**DR CHONG ENG LEONG**

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI J
[SUIT NO: K22-173-2003]
27 SEPTEMBER 2010

C ***CIVIL PROCEDURE:*** *Pleadings - Pleading of material facts - Claim for specific performance of contract - Specifics not pleaded - Prayer to enforce performance of agreement included - Whether specific performance sufficiently pleaded*

D ***CONTRACT:*** *Agreement - Construction of - Sale and purchase agreement - Whether clause must be read in isolation - Whether clause must be considered in context of whole document*

E ***CONTRACT:*** *Breach of contract - Specific performance - Agreement for sale of land - Original title lost - Whether agreement placed obligation upon vendor to apply for replacement title - Whether failure of vendor to secure replacement title amounted to breach by vendor - Whether purchaser could seek specific performance - Whether oral agreement existed requiring purchaser to secure replacement title - Presumption of inadequacy of damages - Whether specific performance to be granted*

F ***CONTRACT:*** *Collateral contract - Nature of - Burden of proving existence of collateral contract - Whether oral collateral contract modifying terms of written letter of undertaking established - Whether oral variation fell foul of rule against parole evidence - Evidence Act 1950, s. 92*

G ***LAND LAW:*** *Transfer of Land - Sale and purchase agreement - Specific performance - Agreement for sale of land - Original title lost - Whether agreement placed obligation upon vendor to apply for replacement title - Whether failure of vendor to secure replacement title amounted to breach by vendor - Whether purchaser could seek specific performance - Whether oral agreement existed requiring purchaser to secure replacement title - Presumption of* H *inadequacy of damages - Whether specific performance to be granted*

The plaintiff's claim was for specific performance of a sale and purchase agreement dated 18 June 2001 ("the agreement") entered into between the plaintiff and the original defendant in this action, Madam Ku Hui Kin ("the defendant"). Under the agreement, the plaintiff had agreed to I purchase Madam Ku's half undivided share in a piece of land ("the said land") situated in Sabah. Clause 8(c) of the agreement provided that the vendor shall deliver to the purchaser's solicitors a letter of undertaking

to apply for a replacement title from the Lands and Surveys Department, Sabah at her sole expenses. Pursuant to cl. 8(c), the defendant, who was illiterate and 76 years of age, had signed the letter of undertaking. The plaintiff's case was that the defendant breached the agreement by failing to apply for the replacement title deed (the original was lost) of the said land within one year as stipulated in cl. 8 of the agreement. The defendant denied any breach and contended that the plaintiff was not entitled to enforce the agreement as the same had ceased to be binding by reason of the non-fulfillment of the condition in cl. 9 of the agreement. Clause 9 made the agreement conditional upon the document of title or a replacement copy to be issued by the Land Office to the purchaser's solicitors within one year. The defendant counterclaimed for the return of documents. The plaintiff relied on cl. 4 of the agreement which provided for specific performance of the agreement in the event of a breach by the vendor. During the course of the trial, the defendant sought to adduce parole evidence to contradict the terms of the agreement and the letter of undertaking. The evidence intended to be adduced was that it was the purchaser's solicitors and not the defendant who was supposed to apply for the replacement title deed. The defendant also claimed that the plaintiff was not entitled to specific performance as the particulars of what he wanted to be specifically performed were not stated in the statement of claim.

**Held (allowing plaintiff's claim; dismissing defendant's counter-claim with costs):**

**(1)** When Madam Ku signed the letter of undertaking, she fully understood what she was signing. The letter of undertaking was issued pursuant to cl. 8(c) of the agreement, thus making it an integral part of the agreement. As such, the letter of undertaking bound the defendant in as much as the defendant was bound by cl. 8(c) itself. (paras 10 & 12)

**(2)** The parole evidence if admitted would directly contradict the terms of the letter of undertaking and as such the court disallowed such evidence as its admission would contravene s. 92 of the Evidence Act 1950. (para 14)

**(3)** The language of cl. 8(c) of the agreement and the letter of undertaking was exceedingly simple. There was no basis for this court to arrive at any other conclusion other than to find that the responsibility to apply for and obtain the replacement title deed lay with the defendant. (paras 19 & 20)

**(4)** A clause in a contract must not be considered in isolation but must be considered in the context of the whole document. Although cl. 9 was silent as to who was to deliver the replacement title deed

to the purchaser's solicitors, the clause could not be read in isolation. It had to be read with cl. 8. Read together, it pointed to the defendant as the person responsible: *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* (refd). (paras 26 & 28)

**(5)** Even though the specifics were not pleaded, the plaintiff's prayer was precise, namely to enforce performance of the agreement, which must necessarily include compelling delivery of the replacement title deed to the purchaser's solicitors. There was no room for doubting what the plaintiff was asking to be performed; *Mohd Fariq Subramaniam v. Naza Motor Trading Sdn Bhd* (dist). (paras 41 & 42)

**(6)** In cases where specific performance is sought, there is a presumption that damages would not be adequate and the contract should be enforced and the burden of rebutting this presumption is on the defendant: s. 11(2) of the Specific Relief Act 1950. The defendant had adduced no evidence to rebut this presumption. Therefore, the position remained that the defendant's breach could not be adequately relieved by compensation in money; *Loh Koon Moy v. Zaibun Sa Syed Ahmad* FC; *Seet Soh Ngoh v. Venkateswara Sdn Bhd.* (para 43)

**Case(s) referred to:**

*Aberfoyle Plantations Ltd v. Khaw Bian Cheng [1959] 1 LNS 3 PC* ***(refd)***

*Amalgamated Investment & Property Co Ltd (in liquidation) v. Texas Commerce International Bank Ltd [1982] QB 84* ***(refd)***

*American Surety Co of New York v. Calgary Mining Co Ltd [1919] 48 DLR 295* ***(refd)***

*Boustead Trading (1985) Sdn Bhd v. Arab Malaysia Merchant Bank Berhad [1995] 4 CLJ 283 FC* ***(refd)***

*Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC* ***(refd)***

*City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd [1985] 1 CLJ 131; [1985] CLJ (Rep) 77 FC* ***(refd)***

*Co-operative Insurance Society Ltd v. Argyll Stores [1977] UKHL 17* ***(refd)***

*Dato' Abd Rahim Mohamad v. Abdul Farish Rashid [2009] 1 CLJ 395 CA* ***(refd)***

*Fawcett Properties Ltd v. Buckingham County Council [1961] AC 636* ***(refd)***

*Fitzgerald v. Masters [1956] 95 CLR 420* ***(refd)***

*Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC* ***(refd)***

*Loh Koon Moy & Anor v. Zaibun Sa Syed Ahmad [1977] 1 LNS 65 FC* ***(refd)***

*Milson v. Northampton and Banbury Junction Railway Co [1874] LR 9 Ch App 279* ***(refd)***

*Mohd Fariq Subramaniam v. Naza Motor Trading Sdn Bhd [1997] 3 CLJ Supp 249 HC* ***(dist)***

*National Coal Board v. Wm Neill & Son [1984] 1 All ER 555* ***(refd)***

*National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC* ***(refd)***

*Pinsia Development Sdn Bhd & Ors v. Hj Abdul Hadi Ahmad & Ors [2005] 1 CLJ 416 CA* ***(refd)***

*Re Comptoir Commercial Anversois v. Power, Son & Co [1918-19] All ER Rep 661* ***(refd)***
*Seet Soh Ngoh v. Venkateswara Sdn Bhd & Anor [1975] 1 LNS 159 FC* ***(foll)***
*Takako Sakao v. Ng Pek Yuen & Anor (No 2) [2010] 1 CLJ 419 FC* ***(refd)***
*Wickman Machine Tools Sales Ltd v. Schuler AG [1974] AC 235* ***(refd)***

**Legislation referred to:**
Evidence Act 1950, ss. 33(a), 92
Specific Relief Act 1950, s. 11(2)

*For the plaintiff - Chan Wai Ling; M/s WL Chan & Assocs*
*For the defendant - Marina Tiu; M/s Yap Chin & Tiu*

*Reported by Amutha Suppayah*

## JUDGMENT

**Abdul Rahman Sebli J:**

**The Claim**

**[1]** The original defendant in this action was Madam Ku Hui Kin @ Ku Hui Kim ("Madam Ku"). Upon her demise Dr Chong Eng Leong who is the son and administrator of her estate was substituted as the defendant. The plaintiff's claim is for specific performance of a sale and purchase agreement dated 18 June 2001 ("the agreement") entered into between the plaintiff and Madam Ku in respect of her half undivided share in a piece of land namely CL035276085 ("the said land") situated in the district of Kota Belud, Sabah. The agreed purchase price of the said land was RM114,000.

**[2]** The plaintiff's case is that the defendant breached the agreement by failing to apply for the replacement title deed (the original was lost) of the said land within one year as stipulated in cl. 8 of the agreement. The defendant denied any breach and contended that the plaintiff is not entitled to enforce the agreement as the same had ceased to be binding by reason of the non-fulfillment of the condition in cl. 9 of the agreement. The defendant counterclaimed for the return of documents and deposit of RM27,067.50.

**[3]** There is no dispute that the agreement was prepared and drawn up by the legal firm of M/s Chau & Thien ("Chau & Thien") of which the plaintiff is one of only two partners, the other partner being Datuk Lawrence Thien. After the signing of the agreement the plaintiff through Chau & Thien made a payment of RM27,067.50 to the Assistant Collector of Land Revenue Kota Belud as the agreed deposit being the outstanding quit rent due.

**[4]** One year after the signing of the agreement the replacement title deed had not been delivered to Chau & Thien. The plaintiff then decided to pay the balance of the purchase price to Madam Ku but this was not accepted by Madam Ku. Apparently she had a change of mind. In her letter dated 16 August 2002 she told the plaintiff that the agreement had been "cancelled automatically". The plaintiff would not have any of that, hence this action.

**[5]** The plaintiff is relying on cl. 4 of the agreement to enforce performance. Clause 4 reads:

> In the event the vendor shall fail or refuse to proceed with the sale of the said portion the purchaser shall be entitled to specific performance of this agreement against the vendor and all payments made by the purchaser hereunder to the vendor shall be refunded to the purchaser immediately.

## The Issues

**[6]** There are two principal issues to be considered, namely:

(a) Whether it is the duty of the defendant to apply for the replacement title deed as stipulated by cl. 8 of the agreement.

(b) Whether the agreement had become void when the replacement title deed was not delivered to Chau & Thien by 17 June 2002 as stipulated by cl. 9 of the agreement.

**[7]** These two questions are interrelated but for the sake of clarity, I shall deal with them separately.

## First Issue

**[8]** Clause 8 of the agreement provides as follows:

> The vendor shall deliver to the legal firm of M/s Chau & Thien, Advocated (sic) & Solicitors (hereinafter referred to as "the said legal firm") as stakeholder the following documents upon signing of this agreement:
>
> (a) a valid and registrable Memorandum of Transfer together with the relevant stamp duty forms and other incidental documents; and
>
> (b) a statutory declaration duly declared by the said vendor on the loss of the issued document of the Title Deed Country Lease No. 035276085; and
>
> *(c) vendor's letter of undertaking to apply for a replacement title from the Lands and Surveys Department, Sabah at her sole expenses*

and the parties hereto hereby irrevocably instructs and authorizes the said legal firm to submit the memorandum of Transfer to the Valuation Office for adjudication and present or lodge the same to the relevant authority for registration in favour of the purchaser only upon the issued document of Title Deed Country Lease No. 035276085 or a replacement copy issued by the Land Office being delivered to the said legal firm and only upon full payment of the balance of the purchase price by the purchaser to the said legal firm as stakeholder. (emphasis added)

**[9]** Pursuant to cl. 8(c) above, Madam Ku, who was illiterate and 76 years of age at the material time signed a letter of undertaking in the office of Chau & Thien in the presence of the defendant and Stephen Thien (PW3), the chief clerk of Chau & Thien. The letter of undertaking reads:

To: Chow Chin Thong @ Chau Chin Tang
P.O. Box 11103
88812 KOTA KINABALU

Dear Sir

Re: Letter of Undertaking
Vendor : Ku Hui Kin @ Ku Hui Kim
Purchaser : Chow Chin Thong @ Chau Chin Tang
Land : Country Lease No. 035276085

I refer to the above matter.

I the undersigned hereby **undertake to apply at my sole expenses for a replacement title deed for the abovestated land** from the Lands & Surveys Department, Sabah in the event the original title deed of the said land could not be located as stipulated under the terms and conditions in the Sale and Purchase Agreement dated 18 Jun 2001 entered into between the abovenamed purchaser and myself.

Dated this day of 18 Jun 2001.

Sgd.

Name: KU HUI KIN @ KU HUI KIM
NRIC No: H0217080 (Old) H0116502 (Old)
250613-12-5028 (New)
(emphasis added)

**[10]** The testimony of PW3 is that before Madam Ku signed the agreement he explained the documents to the defendant. In cross-examination the defendant, a medical doctor and politician by profession admitted that he understood the contents of the letter of undertaking signed by his late mother and that he would have protested if he had disagreed with it. It is clear that the defendant's presence was to make

sure that his late mother's interest was protected. Therefore it is safe to conclude that when Madam Ku signed the letter of undertaking she fully understood what she was signing.

**[11]** There is no need to scratch one's head to figure out what the letter of undertaking means. It means what it says, ie, that Madam Ku undertook to apply for the replacement title deed at her sole expense. Learned counsel for the defendant however contended that the letter of undertaking was never meant to be a term of the agreement but was merely a security document "as per the standard conveyancing practice".

**[12]** With due respect to counsel, her argument ignores the obvious fact that the letter of undertaking was issued pursuant to cl. 8(c) of the agreement, thus making it an integral part of the agreement. As such the letter of undertaking binds the defendant in as much as he is bound by cl. 8(c) itself.

**Admissibility Of Parole Evidence**

**[13]** During the course of the trial the defendant sought to adduce parole evidence to contradict the terms of the agreement and specifically the contents of the letter of undertaking. The evidence intended to be adduced was that before Madam Ku signed the agreement the defendant asked PW3 about the replacement title deed whereupon PW3 confirmed that once Madam Ku signed the agreement and all the necessary documents Chau & Thien would proceed to apply for and obtain the replacement title deed. In other words it was Chau & Thien and not the defendant who was to apply for the replacement title deed.

**[14]** The evidence if admitted would directly contradict the terms of the letter of undertaking. Upon objection by the plaintiff I disallowed such evidence as its admission would contravene s. 92 of the Evidence Act, 1950 ("the Act"). The defendant's argument is that the oral evidence may be admitted as it was pleaded. I rejected this argument as pleading does not render admissible evidence which is otherwise inadmissible by virtue of s. 92 of the Act or any other applicable law. Pleadings do not constitute evidence. They are mere averments of fact (or law) which must be established by evidence. Without evidential backing pleadings are worth nothing.

**[15]** To be admissible the defendant must not only show that the evidence sought to be admitted is pleaded but more importantly it must be shown that the evidence falls within the proviso to s. 92 of the Act. This the defendant failed to do.

**[16]** In her written closing submissions learned counsel for the defendant urged upon me to revisit the decision on the ground that subsequent to the decision new evidence had surfaced. I have considered the points raised and the alleged new evidence and I see no reason to review my earlier decision. Therefore the only documents that stood to be considered in relation to the two issues for determination are the agreement and the letter of undertaking.

**The Defendant's Belief**

**[17]** Notwithstanding the clear language of cl. 8(c) of the agreement and the letter of undertaking the defendant now says he believed it is the job of Chau & Thien to apply for the replacement title deed. With due respect to the defendant I do not think even he himself believes in the truth of what he said, what with the letter of undertaking staring at him in the face. In any event the defendant's belief is irrelevant. What is relevant is whether the letter of undertaking binds the defendant.

**[18]** It is trite law that the court will generally give words of a contract their plain and ordinary meaning even if it leads to an unreasonable result unless the ordinary meaning leads to an absurd result, in which case the ordinary meaning should be construed so as to avoid the absurdity: see *Fitzgerald v. Masters* [1956] 95 CLR 420.

**[19]** The language of cl. 8(c) of the agreement and the letter of undertaking is exceedingly simple, the sort even a layman would have no difficulty understanding. There is no basis for this court to arrive at any other conclusion other than to find that the responsibility to apply for and obtain the replacement title deed lies with the defendant.

**[20]** That disposes off the first issue for determination but in deference to the defendant I shall touch a bit more on his belief that it is the duty of Chau & Thien to obtain the replacement title deed. Now, if indeed that was his belief why was it that he showed no interest in prompting Chau & Thien or the plaintiff himself to get hold of the replacement title deed within the one year period? His inaction is wholly inconsistent with his claim that the time-frame was very important to his late mother. This is what he said in his witness statement:

> I told the plaintiff that I am willing to consider the sale of my mother's share only because I wanted her to use the money for her enjoyment while she could still do so. At that time my mother was almost 76 years old. The timing of the completion of the sale was therefore very important to us as if my mother became too old or infirmed to enjoy the benefit, there was no point in the sale.

**[21]** The law leans in favour of upholding bargains and not in striking them willy-nilly: see *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625 FC. In the absence of fraud or misrepresentation a party signing a contract is bound by its terms and it is wholly immaterial whether he has read the document or not. A provision in a contract will only be void for uncertainty if the court cannot reach a conclusion as to what was in the draftsman's mind or where it is not safe for the court to prefer one possible meaning to other equally possible meanings: see *Fawcett Properties Ltd v. Buckingham County Council* [1961] AC 636.

**[22]** From the totality of the evidence and the probabilities of the case I am inclined to believe that the defendant's real intention is to get out of the bargain due perhaps to an increase in the value of the said land. The defendant's admission in cross examination that the road along the said land has been upgraded explains his change of heart.

## Second Issue

**[23]** In an attempt to get around cl. 8(c) of the agreement and the letter of undertaking the defendant came up with an ingenuous argument that by virtue of cl. 9 of the agreement, the whole agreement became void and therefore unenforceable when the replacement copy of the title deed was not delivered to Chau & Thien by 17 June 2002. The ultimate objective of the argument no doubt is to show that since the agreement had become void cl. 4 ceases to have effect, leaving the plaintiff stranded without any legal remedy. Clause 9 of the agreement is couched in the following terms:

> The sale of the said portion by the vendor to the purchaser under this agreement is conditional upon the issued document of Title Deed Country Lease No. 035276085 or a replacement copy issued by the land office being delivered to the said legal firm within one (1) year failing which the purchaser has the option to cancel the purchase and all payments made hereunder to the vendor shall be refunded immediately to the purchaser.

**[24]** According to counsel, from the express words of cl. 9 it is obvious that the contract of sale was contingent upon a replacement copy of the title deed being delivered to Chau & Thien within one year, ie, by 17 August 2002. Additionally, it was pointed out that nowhere in cl. 9 is it stated that the person responsible for delivering the replacement title deed to Chau & Thien was Madam Ku or any one else for that matter.

**[25]** The effect of a contingent condition in a contract is that the contract shall not take effect unless and until the condition is fulfilled: see s. 33(a) of the Act; see also *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep)

282;. Where the conditional contract of sale fixes a date by which the condition is to be fulfilled, the date must be strictly adhered to and cannot be extended by reference to equitable principles: see *Aberfoyle Plantations Ltd v. Khaw Bian Cheng* [1959] 1 LNS 3.

**[26]** One of the canons of construction is that in order to arrive at the true construction of a document, a clause must not be considered in isolation but must be considered in the context of the whole document: see *City Investment Sdn Bhd v. Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1985] 1 CLJ 131; [1985] CLJ (Rep) 77. This case makes reference to the case of *National Coal Board v. Wm Neill & Son* [1984] 1 All ER 555 where the court highlighted four principles in construing a contract, namely:

(1) Construction of contract is a question of law.

(2) Where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence.

(3) A contract must be construed as at the date it was made; it is not legitimate to construe it in the light of what happened years after or even days later.

(4) The contract must be construed as a whole and also, so far as practicable, to give effect to every part of it.

**[27]** Learned counsel for the defendant further submitted that since the agreement was prepared by Chau & Thien any ambiguity or anomaly in the agreement must be construed in the defendant's favour, citing the *contra preferentum* rule. This contention of course presupposes that there are terms in the agreement that are ambiguous or anomalous. I do not consider the rule to be of any relevance to the present case. It is clear to me that there is no ambiguity or anomaly whatsoever in any term of the agreement.

**[28]** It is true that cl. 9 is silent as to who was to deliver the replacement title deed to Chau & Thien but the cl. must not be read in isolation. It must be read with cl. 8. Read together it points to the defendant as the person responsible. It could not have been the intention of the contracting parties that no one is to be made responsible for delivering the replacement title deed to Chau & Thien or that the identity of the person responsible is to remain a mystery. Without being derogatory the plaintiff being a lawyer himself would not have been so dumb to agree to such terms.

**[29]** To accede to the defendant's argument would be to allow the defendant to benefit from his own wrongs by deliberately omitting to apply for the replacement title deed in order to avoid the contract. In *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC the rule is explained thus:

> ... if a stipulation in a contract be that the contract shall be void on the happening of an event which one or either of the parties can by his own act or omission bring about, then the party who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract.

**[30]** This rule of law was also applied in *Dato' Abd Rahim Mohamad v. Abdul Farish Rashid* [2009] 1 CLJ 395 where the Court of Appeal recognised that 'there is a presumptive rule of construction that a party is not to be permitted to take advantage of his own wrong'. The defendant's conduct falls squarely within this mischief rule.

**[31]** Going by the terms of cl. 9 it is clear that it was inserted for the sole benefit of the plaintiff. The purpose is to give the plaintiff the option to cancel the purchase of the said land in the event the replacement title deed was not delivered to Chau & Thien within one year. The option was not exercisable at the instance of the defendant.

**[32]** By opting not to cancel the agreement upon expiry of the one year period the plaintiff cannot, as the defendant seems to be suggesting, be taken to have forfeited his right to enforce the agreement if otherwise he was not the party in default. If he chose not to cancel the purchase after the expiry of the one year period he retains the right to invoke cl. 4 of the agreement.

**[33]** The defendant however says the plaintiff should not be allowed to blow hot and cold, in one breadth saying that he had the option to cancel and in the next saying that he could proceed with the agreement despite opting not to cancel the purchase. It was argued that by doing so the plaintiff was in fact asking to rewrite cl. 9 of the agreement. Having regard to the language of cl. 9 I do not see any substance in the argument.

**[34]** Counsel is of course right in saying that the court should not imply a term merely because one party, if he had thought about the matter, would have insisted on its inclusion. This is the rule laid down

in *Re Comptoir Commercial Anversois v. Power, Son & Co* [1918-19] All ER Rep 661. But here the plaintiff is not asking the court to imply any such term. All the plaintiff is saying is that the option to cancel is his and he opted not to exercise the option which he is perfectly entitled to.

**[35]** It is spinning the language to say that because the plaintiff chose not to cancel the purchase on the expiry of the one year period the plaintiff loses the right to enforce the agreement. This argument is palpably wrong and misconceived because the right to enforce the agreement does not depend on whether the plaintiff made the choice one way or the other but whether there has been a breach of the agreement by the defendant. Clause 4 makes this abundantly clear.

**Subsequent Conduct Of Parties**

**[36]** It was argued that the subsequent conduct of the parties is evidence that the agreement has been rendered void. The decision of the Court of Appeal in *Pinsia Development Sdn Bhd & Ors v. Hj Abdul Hadi Ahmad & Ors* [2005] 1 CLJ 416 was cited in support where Gopal Sri Ram JCA (as he then was) said at pp. 419-420:

> We accept that it is settled law that an agreement may not be interpreted by reference to the subsequent conduct of the parties thereto (see *Wickman Machine Tools Sales Ltd v. Schuler AG* [1974] AC 235). But it is equally well settled that parties may by their subsequent conduct give a term in an agreement a particular meaning. See *American Surety Co of New York v. Calgary Mining Co Ltd* [1919] 48 DLR 295, a decision of the Privy Council. In such an event it is that meaning which binds the court and the court is not then entitled to discover some other meaning in the exercise of its interpretive jurisdiction. See *Amalgamated Investment & Property Co Ltd (in liquidation) v. Texas Commerce International Bank Ltd* [1982] QB 84; *Boustead Trading (1985) Sdn Bhd v. Arab Malaysia Merchant Bank Berhad* [1995] 4 CLJ 283.

**[37]** Learned counsel outlined nine instances of the parties' conduct which according to her, supports the defendant's contention that the agreement has become unenforceable. I have given due consideration to the evidence as outlined and I do not find any of them to be supportive of the defendant's argument. They are at best neutral evidence supporting neither the defendant's nor the plaintiff's case in so far as the question of liability is concerned.

**[38]** Lest the issue be clouded by the lengthy notes of evidence and the legal arguments, I have reminded myself that the single most important issue to consider is whether the defendant had by his conduct

reneged on his promise to sell the said land, in breach of the agreement. That is the crux of the matter. The rest are sideshows. On the evidence I have no doubt that the defendant was in breach by failing to comply with cl. 8(c) of the agreement, resulting in the non-performance of the contract almost 10 years after its execution.

## Whether Plaintiff Entitled To Relief

**[39]** At the outset of her written submissions counsel for the defendant, submitted that the plaintiff is not entitled to specific performance as the particulars of what he wants to be specifically performed are not stated in the statement of claim. For this proposition reliance was placed on the judgment of James Foong J (as he then was) in *Mohd Fariq Subramaniam v. Naza Motor Trading Sdn Bhd* [1997] 3 CLJ Supp 249.

**[40]** The case is relevant but has unfortunately been applied randomly without proper regard to its factual matrix. It is clear in that case that it was doubtful whether it was the sale of the taxi or reinstatement of the plaintiff's appointment as a taxi driver that the plaintiff asked to be performed.

**[41]** The case before me stands on a different footing. Even though the specifics are not pleaded the plaintiff's prayer is precise, namely to enforce performance of the agreement, which must necessarily include compelling delivery of the replacement title deed to Chau & Thien. There is no room for doubting what the plaintiff is asking to be performed.

**[42]** In *Takako Sakao v. Ng Pek Yuen & Anor (No. 2)* [2010] 1 CLJ 419 the Federal Court cited with approval the following speech by Lord Hoffman in *Co-operative Insurance Society Ltd v. Argyll Stores* [1977] UKHL 17; [1998] AC 1; [1997] All ER 297; [1997] 2 WLR 898:

> A decree of specific performance is of course a discretionary remedy and the question for your Lordships is whether the Court of Appeal was entitled to set aside the exercise of the judge's discretion. There are well established principles which govern the exercise of the discretion but these, like all equitable principles, are flexible and adaptable to achieve the ends of equity, which is, as Lord Selborne LC once remarked, to 'do more perfect and complete justice' than would be the result of leaving the parties to their remedies at common law. (*Wilson v. Northampton and Banbury Junction Railway Co* [1874] LR 9 Ch App 279, 284). Much therefore depends upon the facts of the particular case ...

**[43]** In cases where specific performance is sought, there is a presumption that damages would not be adequate and the contract should be enforced and the burden of rebutting this presumption is on

the defendant: s. 11(2) of the Specific Relief Act 1950 (Revised 1974); see also *Loh Koon Moy & Anor v. Zaibun Sa Syed Ahmad* [1977] 1 LNS 65 FC. Section 11(2) the Specific Relief Act 1950 is reproduced below:

> Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer immovable property can thus be relieved.

**[44]** The defendant has adduced no evidence to rebut this presumption. Therefore the position remains that the defendant's breach cannot be adequately relieved by compensation in money.

**[45]** In *Seet Soh Ngoh v. Venkateswara Sdn Bhd & Anor* [1975] 1 LNS 159 the Federal Court held that where a housing developer was attempting to breach the contract with the purchaser, damages would not be adequate remedy because of the tremendous increase in the value of land and the cost of construction. The reasoning applies with equal force to the facts of the present case.

## Conclusion

**[46]** For reasons aforesaid I can only come to the conclusion that the plaintiff has proved his case on the balance of probabilities and therefore entitled to judgment. Accordingly I made the following orders in favour of the plaintiff:

(a) Specific performance of the agreement.

(b) Damages in the sum of RM27,067.50.

(c) That the defendant do apply for the replacement title deed within 30 days from the date of judgment.

(d) That the plaintiff is authorised to apply for the replacement title deed in the event the defendant shall fail to do so within 30 days from the date of judgment and that the costs of such application be borne by the defendant.

(e) That the defendant do execute the transfer form together with the other requisite transfer documents upon payment of RM86,932.50 by the plaintiff being the balance of the purchase price.

(f) Costs of the proceedings shall be borne by the defendant, to be taxed unless otherwise agreed.

**[47]** The counterclaim was dismissed with costs.